V & S ProGalv, Inc. and V & S Schuler Tubular Products, Inc., Single Employer and alter egos *and* Shopmen's Local Union No. 620 of the International Association of Bridge, Structural and Ornamental Iron Workers. Cases 17–CA–18223, 17–CA–18273–2, 17–CA–18319, and 17–CA–18401–2

May 30, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On November 26, 1996, Administrative Law Judge Lawrence W. Cullen issued the attached decision, as amended by an erratum on January 23, 1997. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief to the Respondent's exceptions and the Respondent filed a response in support of its exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In the absence of exceptions, we adopt the judge's dismissal of the complaint against Tubular based on his findings that the Respondents ProGalv and Tubular were neither a single employer nor alter egos.

However, in adopting the judge's finding of unlawful assistance and support to the In-House Employee Committee, we do not suggest that holding meetings of the committee during paid worktime would by itself be a per se violation of Sec. 8(a)(2) and (1) of the Act. See *Electromation, Inc.*, 309 NLRB 990, 998 fn. 31 (1992).

For the reasons set forth in Chairman Gould's separate concurring opinion in *Keeler Brass Co.*, 317 NLRB 1110 (1995), he agrees with his colleagues and the judge that the In-House Employee Committee is a labor organization within the meaning of Sec. 2(5) and that the Respondent violated Sec. 8(a)(2) by dominating, assisting, and supporting the committee.

[3] The Respondent has excepted, to among other things, the judge's imposition of a bargaining order, to remain in effect under the 1-year initial certification rule. It asserts that the bargaining order is improper and that its effective period is too long. We find partial merit in this argument. It is well established that the appropriate affirmative remedy for restoring the status quo ante in an unlawful withdrawal of recognition case is a bargaining order. However, although we agree that a bargaining order is warranted, we do not agree with the judge that the period involved should be a certification year; rather the remedial bargaining obligation should be imposed only for a reasonable period of time. *Caterair International*, 322 NLRB 64 (1996). Therefore, we shall modify the Order and notice accordingly.

We shall also conform the judge's recommended Order and notice to the violations found.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, V & S ProGalv, Inc., Muskogee, Oklahoma, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following as paragraph 2(b).

"(b) Rescind, on request of the Union, the unilateral changes made with respect to the formula for calculating employee seniority, the method of assigning overtime work to employees, the institution of a retirement program for employees, and the institution of a partial layoff, and bargain in good faith with the Union for a reasonable period of time."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT instigate and solicit the employee drafting and circulation of a petition seeking the decertification of Shopmen's Local Union No. 620 of the International Association of Bridge, Structural and Ornamental Iron Workers.

WE WILL NOT foster and render assistance and support to the In-House Committee.

WE WILL NOT promise benefits in the form of the institution of a monthly matching contribution savings plan for employees conditioned on employees' rejection of the Union as their collective-bargaining representative.

WE WILL NOT threaten employees with loss of benefits if the employees select the Union as their collective-bargaining representative.

WE WILL NOT interrogate employees with regard to their cooperation in the National Labor Relations Board's investigation of unfair labor practices, thus interfering with Board process.

WE WILL NOT withdraw recognition from the Union and refuse to bargain with the Union on behalf of the employees in the following appropriate unit:

> All our production and maintenance employees, including employees engaged in fabrication, galvanizing, and/or preparation of iron, steel, metal products or in maintenance work in or about our facility, excluding all office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT fail to adhere to the terms of the expired collective-bargaining agreement with respect to the formula for calculating employee seniority, the method of assigning overtime work to employees and by the unilateral institution of a retirement program for employees without prior notice to the Union and by instituting a partial layoff without affording the Union an opportunity to bargain with us with respect to these mandatory subjects for collective bargaining.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, meet and bargain collectively with Shopmen's Local Union No. 620 of the International Association of Bridge, Structural and Ornamental Iron Workers within 14 days of such request and for such other times as agreed to by the Union concerning terms and conditions of employment of our employees in the unit described above.

WE WILL disestablish the In-House Employee Committee.

WE WILL, on request by the Union, rescind the unilateral changes we made with respect to the formula for calculating employee seniority, the method of assigning overtime work to employees, the institution of a retirement program for employees, and the institution of a partial layoff, and WE WILL bargain in good faith with the Union for a reasonable length of time.

WE WILL make our employees whole for any loss of wages and benefits with interest, they have suffered by reason of our institution of unilateral changes in their terms and conditions of employment.

V & S PROGALV, INC.

Lyn Buckley, Esq. and *Francis A. Molenda, Esq.*, for the General Counsel.

Andrew Smith, Esq. (Vorys, Sater, Seymour & Peas), of Columbus, Ohio, for Respondent V & S Schuler Tubular Products, Inc.

Ronald Petrikin, Esq. (Crowe & Dunlevy), of Tulsa, Oklahoma, for Respondent V & S ProGalv, Inc.

David Turnbull, District Representative, of Omulgee, Oklahoma, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me on March 4, 5, and 6, 1996, in Tulsa, Oklahoma, pursuant to the third consolidated complaint issued by the Regional Director for Region 17 of the National Labor Relations Board (the Board) on February 13, 1996. The complaint is based on charges and amended charges filed by Shopmen's Local Union No. 620 of the International Association of Bridge, Structural and Ornamental Iron Workers (the Charging Party or the Union). The complaint alleges that Respondents V & S ProGalv, Inc. and V & S Schuler Tubular Products, Inc., Single Employer and Alter Egos (ProGalv, Tubular, or Respondent) violated Section 8(a)(1), (2), and (5) of the National Labor Relations Act (the Act). ProGalv and Tubular have filed separate answers denying that they are a single employer and an alter ego of each other and have denied the commission of any violations of the Act.

On the entire record in this proceeding, including my observations of the witnesses who testified here and after due consideration of the briefs filed by the General Counsel and Respondents, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges that ProGalv and Tubular are a single employer and alter egos and referring to them jointly as Respondent alleges that at all material times Respondent has been a corporation, with its office and place of business in Muskogee, Oklahoma (Respondent's facility), has been engaged in the nonretail business of performing fabrication, galvanizing, and related work on iron, steel, and other metal products and that at all material times Tubular and ProGalv have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have administered a common labor policy; have shared common premises and facilities; have provided services for each other and will make sales to each other; have interchanged personnel with each other; have common insurance; and have held themselves out to the public as single-integrated business enterprises and based on its operations described above that Tubular and ProGalv constitute a single-integrated business enterprise and a single employer within the meaning of the Act.

The complaint further alleges that on or about June 21, 1995, Respondent established and incorporated a division called V & S Schuler Tubular Products, Inc. to perform fabrication work and that Tubular was established by Respondent as a subordinate instrument to and a disguised continuation of V & S ProGalv, Inc. and, that based on this, Respondent V & S Schuler Tubular and V & S ProGalv are, and have been at all material times, alter egos and a single employer within the meaning of the Act.

The complaint further alleges that during the 12-month period ending September 30, 1995, Respondent ProGalv, in conducting its business operations described above, pur-

chased and received at its facility goods valued in excess of $50,000 directly from points outside the State of Oklahoma and sold and shipped from its facility goods valued in excess of $50,000 directly to points outside the State of Oklahoma and that Respondent has at all material times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent Tubular admits in its answer that it is a corporation with an office and place of business in Muskogee, Oklahoma, and that it is engaged in the nonretail business of steel fabrication but states it is without knowledge or information sufficient to form a belief as to what the phrase "related work on iron, steel and other metal products" means and denies that it is engaged in any work which could be categorized by that phrase. Tubular admits that some, but not all of its officers and directors are also officers and directors of Respondent ProGalv and that some, but not all, of its owners have an ownership interest in ProGalv. Respondent Tubular admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, but denies the remaining allegations of the complaint set out above.

Respondent ProGalv admits that it has been a corporation with an office and place of business in Muskogee, Oklahoma, and has been engaged in the nonretail business of performing galvanizing and related work on iron, steel, and other metal products as alleged in the complaint. ProGalv further admits that some, but not all, of its officers and directors are also officers and directors of V & S Tubular. It further admits that it meets the jurisdictional prerequisites alleged in the complaint and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. ProGalv further admits that Attorney J. Ronald Petrikin has served as its attorney, but denies that he has been its agent within the meaning of Section 2(13) of the Act.

I find, based on the record as a whole and as will be discussed later, that ProGalv and Tubular are each distinct employers within the meaning of Section 2(6) and (7) of the Act and do not constitute a single employer or an alter ego of each other.

The complaint further alleges that:

(a) At all material times the following named individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Werner Niehaus	President of Respondent V & S ProGalv and of Respondent V & S Tubular
Brian Miller	Vice President, Treasurer of Respondent V & S ProGalv and of Respondent V & S Tubular
Robert Voigt	Chairman of Respondent V & S ProGalv and of Respondent V & S Tubular
Johnnie Kelley	Co-owner and Plant Manager until on or around August 1995 of Respondent V & S ProGalv
Harvey Morgan	Vice President, Sales Manager and General Manager of Respondent V & S ProGalv
Brian Morgan	Plant Manager commencing in or around August 1995 of Respondent V & S ProGalv
Joel Shepherd	Vice President, Sales Manager and General Manager of Respondent V & S Tubular
Jerry Townsend	Plant Manager of Respondent V & S Tubular

(b) At all material times, J. Ronald Petrikin has held the position of Respondent's attorney and has been an agent of Respondent within the meaning of Section 2(13) of the Act.

Tubular admits that each of the persons listed in the foregoing portion of the complaint occupy or occupied the corresponding employment positions listed therein, except the positions alleged as held by Joel Shepherd and Jerry Townsend and further denies that Johnnie Kelley, Harvey Morgan, or Brian Morgan have ever been supervisors or agents of Tubular. It further states it is without knowledge as to the duration of Petrikin's representation of ProGalv in connection with this action but admits that Petrikin has served as ProGalv's legal counsel in connection with various matters pending before the National Labor Relations Board.

ProGalv admits that, with the exception of Joel Shepherd and Jerry Townsend, the individuals listed above have been supervisors and agents of Respondent ProGalv within the meaning of the Act at the approximate times listed. It further admits that Petrikin has served as its attorney and has performed certain acts in furtherance of the legal representation but denies that he has been an agent of ProGalv under Section 2(13) of the Act. I find, based on the record in this case, that the above listed individuals in Section (a) and (b) have been supervisors within the meaning of Section 2(11) of the Act and have been agents of ProGalv within the meaning of Section 2(13) of the Act with the exception of Townsend and Shepherd.

II. THE LABOR ORGANIZATION

I find on the basis of the record in this case that at all times material Shopmen's Local Union No. 620 of the International Association of Bridge, Structural and Ornamental Iron Workers (the Union) has been a labor organization within the meaning of Section 2(5) of the Act and since at least September 13, 1994, Respondent ProGalv has recognized the Union as the exclusive collective-bargaining representative of ProGalv's employees in the following appropriate unit under Section 9(b) of the Act:

> All production and maintenance employees of Respondent, including employees engaged in the fabrication, galvanizing, and/or preparation of iron, steel, metal products or in maintenance work in or about Respondent's facility, excluding all office clerical employees, guards and supervisors as defined in the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Since 1934 the Union or its predecessor Local 476 has represented the employees at the Muskogee, Oklahoma facility which was operated by Muskogee Iron Works which was engaged in the fabrication of lattice tower works, seed houses, beams, and channels. In approximately 1980, the plant was purchased by Union Metal which engaged in the fabrication of utility related products. Approximately 10 to 12 of Respondent ProGalv's current employees were employed by General Metal. In the end of 1992, Respondent ProGalv's predecessor, Professional Galvanizing Associates, Inc.[1] purchased the plant from Union Metal and signed a contract with the Union and hired some of Union Metal's employees and put the remainder of the employees on a preferential hiring list. Professional Galvanizing Associates, Inc. had been formed by Harvey Morgan and Johnnie Kelley who had worked together at another company in the galvanizing business for several years. Galvanizing is the process of applying zinc to steel and other metals.

According to unrebutted testimony of David Turnbull, the Union's International district representative of the area including Muskogee, Oklahoma, where the plant was situated, he functioned as the chief representative on behalf of the Union and the Union bargained with Respondent, ProGalv's predecessor commencing on November 10, 1993. Attorney Ronald Petrikin had represented Union Metal prior to this and represented ProGalv at the meetings. On December 1, 1993, ProGalv entered into an agreement with the Union for the assumption and modification of General Metal's July 1, 1992, to June 30, 1995 labor agreement. Turnbull testified that ProGalv's representatives (Morgan and Kelley) informed the Union they were initially going to engage in galvanizing and were not going to continue metal fabrication which had been performed by Union Metal, but might be involved in fabrication in the future. The employee unit description included fabrication work which was left in the description and there was a job classification of fabricator provided for in Union Metal's agreement which was adopted by ProGalv without change in these regards. Thus, ProGalv started out in the galvanizing business and restricted its operations to galvanizing although the unit description did provide for fabrication work.

ProGalv ran into financial difficulties and needed an infusion of capital and sought out V & S Schuler Engineering, Inc. for additional financial backing. As a result Voigt and Schweitzer, a German investment company, became a major investor in ProGalv which was renamed to V & S ProGalv and Kelley and Morgan only maintained a 20-percent interest each in the stock of V & S ProGalv.

B. *Contentions of the Parties with Respect to the Single-Employer and/or Alter Ego Issues*

The counsel for the General Counsel contend that ProGalv and Tubular are a single employer and/or alter egos under the Act. They argue that the highest levels of management of ProGalv and Tubular are the same in the persons of Voigt, Niehaus, and Miller who also serve as a majority of the board of directors and that Niehaus exercises oversight of lower management and of labor relations and that the consolidation of financial matters is under Miller. They also argue that the two operations are interrelated as they are in the same plant and that galvanizing and painting and coating of Tubular's product are performed by ProGalv, and that Tubular then wraps the products and ships them to its customers. They also assert the common ownership of the stock of ProGalv and Tubular as a significant factor supporting a finding of a single employer and/or an alter ego relationship between ProGalv and Tubular.

Respondent Tubular asserts that ProGalv and Tubular are not a single employer and are not alter egos. Tubular contends that the products of ProGalv and Tubular and their methods of production demonstrate their difference. ProGalv utilizes a hot zinc dip galvanizing process to treat and coat metals and also operates a duplex paint line for corrosion protection whereas Tubular fabricates metals (i.e., it punches, cuts, fits, welds, and grinds steel) and "specializes in the construction of tubular structures such as cellular telephone towers." It designs some customer products which requires the ability to read blueprints. Tubular does not galvanize or paint steel and ProGalv does not fabricate or design metal structures. At the hearing Niehaus testified that his Voigt and Schweitzer group has never invested in a combination of fabrication and galvanizing business because :

> [T]hey know it doesn't work. It doesn't fit together because you have just, it's a complete different business with different knowledge, different skills of people, different markets, different markets, different suppliers, so nothing matches together between the job galvanizing business and the fabrication business.

Tubular contends that as a result of these "irreconcilable differences, Tubular's business accounts for only a small percentage of Pro Galv's overall production" and "Similarly the work that Tubular has done for Pro Galv is a pittance relative to the overall scope of Tubular's business." It notes that as of "December, 1995 Tubular had a backlog of over $500,000 in customer orders" and "The work that Tubular did for Pro Galv was only worth about $20,000."

Tubular also argues that they neither compete for or share customers nor do they represent that they are connected to each other or bid on the same projects. They utilize "different, highly specialized equipment for their own production process." They do not do each others work. Nor do they use each others' tools or share equipment. They operate in separate areas of the plant divided by a yellow line and have plans to build a wall to partition the separate work areas between Tubular and ProGalv. They "have different offices, doors, time clocks, equipment, stationery, telephone lines, facsimile lines, post office boxes and signs." Tubular notes that there has been a delay in posting a Tubular sign outside the facility as a result of problems with the north wall.

Tubular acknowledges "a few instances of overlap between the officers of Tubular and Pro Galv" in which Niehaus is president of both companies and Miller is vice president of both companies and Voigt is chairman of both companies but contends they rely on the exclusive association of Morgan with ProGalv as its senior vice president and of Shepherd with Tubular as its vice president in which each

[1] On August 9, 1995, Professional Galvanizing Associates, Inc. changed its name to V & S ProGalv, Inc.

have virtually exclusive control over the day-to-day operations of their respective companies. Tubular contends further that Niehaus is the only other officer (other than Morgan and Shepherd) to have direct contact with Tubular and ProGalv and notes that Niehaus has no knowledge of the fabrication process and has no day-to-day involvement with Tubular or ProGalv. Tubular further urges that the "issue in this case is not the relationship of Pro Galv or Tubular to Voigt & Schweitzer, but the relationship to each other."

Analysis

In considering whether an employer is a single employer, the Board utilizes the following criteria:

(1) Common management
(2) Centralized control of labor relations
(3) Interrelation of operations
(4) Common ownership

Rebel Coal Co., 279 NLRB 141, 143 (1986); *Truck & Dock Services*, 272 NLRB 592 fn. 2 (1984); *Radio Union Local 1264 v. Broadcast Service*, 380 U.S. 255, 256 (1965). The determination of whether two nominally distinct entities are under all of the circumstances a single integrated enterprise is made on a case-by-case basis, *Blumenfield Theaters Circuit*, 240 NLRB 206, 215 (1979), enfd. 626 F.2d 865 (9th Cir. 1980).

In the instant case there is common ownership. Thus, V & S Schuler and Voigt and Schweitzer, a German investment company, own 75 percent of the stock of ProGalv and 75 percent of the stock of Tubular clearly representing a majority interest in each corporation. There is a commonality of the highest levels of management between V & S and ProGalv and Tubular. However, the day-to-day management of ProGalv is entrusted to Harvey Morgan, its vice president, sales manager, and general manager, whose wife owns 25 percent of ProGalv's stock, and the day-to-day management of Tubular is entrusted to Joel Shepherd, its vice president, sales manager, and general manager who also has a small ownership interest (10 percent). I find with some limited exceptions that the highest level of management oversees ProGalv and Tubular in a relationship that approaches that of passive investor as contended by Respondent Tubular. Although I credit the testimony of Turnbull that Respondent ProGalv's attorney referred to Werner Niehaus as the man who was driving the train in a conversation prior to negotiations and although it is apparent that one of the stumbling blocks at negotiations was Niehaus' insistence that various job classifications be eliminated to reduce the number to two, and it is undisputed that Niehaus makes monthly visits of 1 to 2 days to check the overall operations and cleanliness and finances of both ProGalv and Tubular, the day-to-day management of ProGalv is in the hands of Harvey Morgan and his son Brian Morgan who serves as plant manager and that of Tubular is in the hands of Joel Shepherd. Although it is clear that Niehaus has the final authority which he has exercised on some occasions, Morgan and Shepherd make the decisions which affect their operations and have the complete authority to hire and fire and do so without consultation with Niehaus or Miller. Voigt is in Germany and has no direct contact with ProGalv or Tubular. I thus find that the management of ProGalv by Morgan and of Tubular by Shepherd is distinct and for most practical purposes is exercised independently of the other. Morgan has no financial interest in Tubular and plays no role in its operations. Shepherd has no financial interest in ProGalv and plays no role in its operations. With respect to their operations, I find there is no interrelationship of the operations of ProGalv and Tubular. While it is undisputed that Tubular's operation was set up with a view to operating separately from ProGalv and the use of a line drawn in the overall plant to separate the two businesses might seem suspect as to its purpose initially, it is clear that ProGalv and Tubular have maintained separate operations with only limited sharing of employees (one receptionist). While it is also true that the unit certification of ProGalv's employees includes fabricators and that ProGalv's predecessor Union Metal did fabrication as well as galvanizing work and conceivably ProGalv could choose to involve itself with fabrication work in the future, it has not done so to date. There are no grounds for considering Tubular as a successor to Union Metal and no ground for concluding that its employees are covered by the certification of the unit employees adopted by ProGalv.

I thus conclude that the record discloses that there is common ownership of a majority interest in ProGalv and Tubular, but the bulk of the active management of each is carried on distinctly from the other and that there is only meager evidence of centralized control of labor relations and/or of interrelation of operations. I thus conclude that ProGalv and Tubular are not a single employer.

With respect to the General Counsel's alternative allegation that ProGalv and Tubular are alter egos, the Board utilizes additional factors and a broader standard in determining whether two ostensibly distinct entities are in fact alter egos. The Board considers whether the entities in question are "'substantially identical,' management, business purpose, operating equipment, customers, and supervision, as well as ownership." *Crawford Door Sales Co.*, 226 NLRB 1144 (1976); *Advance Electric*, 268 NLRB 1001 at 1002 (1984). In the instant case, I find that counsel for the General Counsel have not established that ProGalv and Tubular are alter egos. As discussed above I find that although there is common ownership, the day-to-day management of ProGalv is entrusted to Morgan and that of Tubular is entrusted to Shepherd, including separate control of labor relations and I find virtually no interrelation of operations. In this regard I find the business purpose of ProGalv as a galvanizer of steel and that of Tubular as a fabricator are not interrelated. Furthermore there is no evidence that the two entities have a common customer base. I reject as constrained the counsel for the General Counsel's argument that because Tubular has utilized ProGalv to galvanize some of the products fabricated by Tubular, that this establishes a common customer base. Rather I credit Morgan's testimony that whereas Shepherd attempted to negotiate lower prices from ProGalv for galvanizing services, that Morgan declined to do so and the testimony of both Morgan and Shepherd concerning the difficulty of negotiating the lease of the premises by ProGalv to Tubular. While it cannot be ignored that there have been some instances of unpaid invoices by ProGalv to Tubular and an offset of Tubular's services for the rental of ProGalv's facility, these have been limited in number and amount and do not establish substantial interrelationship of operations. Furthermore as cited previously there is not an interchange of

employees and the employees observe the line drawn to define Tubular's operation from that of ProGalv.

C. *The Allegations Against ProGalv*

Facts

After unsuccessful negotiations for a successor labor agreement between the Union and ProGalv, ProGalv declared an impasse and imposed its final offer and the Union called a strike which commenced on July 5, 1995. Several employees returned to work within a few days of the strike and within 2 weeks, the remainder of the employees reported to work. Following the return of the first employees from the strike, they expressed to management, notably to President Kelley, their concern that the Union might impose substantial fines against them for crossing the picket line to return to work. This was raised by Keith Griggs, a leadman, to President Kelley who after consultation with legal counsel obtained the telephone number of the Board's resident office in Tulsa, Oklahoma, and passed it on to the employees who spoke to a Board representative who confirmed that the Union could fine them for crossing the picket line but could not advise them as to whether the Union would actually do so. Leadman Keith Griggs and leadman Clifford Wallen spoke to President Kelley on behalf of the employees' continued concerns and Kelley obtained advice as to how the employees could withdraw their membership from the Union and passed it on to them.

Kelley testified that Griggs had complained frequently to Kelley in the past about the difficulty of getting work done by the employees because of the numerous different job classifications under the terms of the existing collective-bargaining agreement. Respondent had proposed to the Union during negotiations to reduce the number of classifications to two (galvanizers and maintenance men) a proposal put into effect by the Respondent after the breakdown of negotiations and the declaration of impasse.

Griggs testified that in the spring (March or April) of 1995, he found a blank petition to get rid of the Union in an envelope marked NLRB in his truck as he was leaving work at the end of the day. The next day he asked President Kelley if he had put it in his truck and Kelley said, "no," and also said he could not talk about it or it would "get him in trouble." Griggs showed Kelley the petition and Kelley looked at it and told Griggs to see if he could obtain some signatures on it. Griggs took it out into the shop and attempted to obtain signatures. He signed it and obtained additional signatures. He then "passed it around some more and then I couldn't get anybody else to sign it." He put the petition in his notebook in the office and Kelley told him to try to get additional signatures and when he went to retrieve the petition, he was unable to find it. Kelley was called by the Respondent at the hearing and corroborated the foregoing testimony in part but denied having given Griggs any instructions with regard to the petition. This incident occurred outside the 10(b) period and is not alleged as a violation in the complaint. I credit Griggs' testimony over that of Kelley.

Griggs testified further that he went out on strike on July 5, 1995, for 1 day and returned to work the next day. He testified that on the day he returned to work, he told Kelley, "I couldn't believe these guys were still out on strike." The next day Kelley told Griggs and leadman Clifford Wallen that he believed that some of the employees were starting to come back and told them "that we should get up another paper to have the guys to sign," "to get the union out." Kelley wrote down the wording to be put on the petition but told them they should copy it so it would be in their own handwriting and attempt to have employees sign it as they returned from the strike. Kelley said he would call his attorney to check the correct wording. The next day Kelley told them to put, "We no longer want the union to represent us anymore." Griggs and Wallen then circulated the petition in the presence of Kelley during worktime. After obtaining signatures they returned the petition to Kelley who told them they needed more signatures as they needed at least 18 signatures which would constitute a majority of the employees. Almost every day one or two employees would return from the strike and Griggs and Wallen would make up a new petition and obtain additional signatures and give them to Kelley who would make copies for them and retain the original. Ultimately they obtained over 18 signatures on the petition. Wallen was not called to testify. Kelley acknowledged at the hearing that he received the petition (R. Exh. 1) from Griggs and testified that the handwriting on the petition was that of Wallen. He testified that he told them he would call his attorney and would ask for advice as to how to proceed. Kelley testified that on the Friday before he received the petition Griggs and Wallen had come to his office and told him that many of the employees who had returned to work were concerned about being fined by the Union for crossing the picket line. Earlier that same day several employees had expressed this concern to him and after consultation with his attorney he placed a call to Resident Officer Frances Molenda and called the affected employees to his office where he had a speaker phone and he then left and closed the office door. When the employees returned he asked Greg Morgan (Harvey Morgan's brother) what had happened and Greg Morgan told him that Molenda had told them it was possible that the Union might fine them for crossing the picket line but did not say whether the Union would do so. Kelley told him to return to work which he did. Later that day Griggs and Wallen told him that the employees were concerned about the possibility of being fined by the Union and asked him what the Company was going to do about it and he told them the Company could not do anything and the employees would have to do something about it. Griggs asked him what the employees could do and he "told them that we'd already been through that drill once before and he knew what the procedure for getting rid of the Union was." He also told Griggs it would have to be in writing and be signed by the employees and convey their wishes.

Griggs testified that in mid-July 1995 some of the employees suggested that they form an in-house union to discuss items they wanted and that he asked Kelley about it. Kelley told Griggs that it would be called a committee rather than an in-house union and that they would talk further about it after they received sufficient signatures on the petition. In late July or early August, Kelley told Griggs there should be five members on the committee which should include Griggs and Wallen and employee Jim Gates who had raised the possibility of an in-house union or at least two of these three employees and there should be someone from the night shift on the committee also. Griggs subsequently told Kelley that he had called a meeting of the employees during shift change

in order to have as many employees attend as possible. Griggs held the meeting and told the employees that Kelley had said they could have a committee of five employees. He also told them that if there was anything they wanted, which the Union could have presented, that the committee would attempt to get it. The committee was selected but included six members instead of the five Kelley had suggested. It included Griggs and Gates, two of the three employees that Kelley had recommended. When informed that there were six members, Kelley said he had specified that there be five. Griggs told Kelley that Griggs was the last member chosen and Kelley assented. Following the meeting, the committee made up a list of requests which was presented to Kelley. There were a number of items on the list such as a return to the original job classifications prior to their reduction to two classifications by management following the strike, wage restoration, a bonus for production, a savings account to be contributed to by management, less expensive medical insurance, and uniforms. Kelley had two or three meetings with the committee before he left the Company in August. At one of the meetings an employee raised the possibility of a bonus for production of a million pounds in a month. At a subsequent meeting Kelley told the employees that the Company would need a million five hundred pounds to obtain a bonus. No bonus was ever granted. In response to complaints by the committee about the high cost of their current medical insurance, Kelley brought an insurance representative to the next meeting who discussed other plans and told the committee members that other plans were as expensive as the current one. At one meeting Kelley suggested to the committee an investment program to which the Company would contribute 3 percent. The committee responded favorably and Kelley told them he was checking into it and would have someone talk to them. Subsequently, a representative came in, talked to each employee individually and enrolled them in a retirement plan contributed to by the Company. Following Kelley's departure, Harvey Morgan took over as chief operating officer of the Company and Morgan met with the employees on two occasions. Following the filing of the 8(a)(2) charge against Respondent for the establishment of and dealing with the committee, Morgan told an employee that the committee could not meet with management any longer because the Union had filed a charge. The committee has never been disestablished.

Respondent withdrew recognition from the Union on July 27, 1995, on the basis of the petition having been signed by a majority of unit employees that the employees no longer wished to be represented by the Union. Subsequently, on July 31, the Union sent the Respondent another proposal for a collective-bargaining agreement. In answer to this proposal the Respondent reaffirmed its withdrawal of recognition. Subsequently the Union sent a bargaining proposal in the fall of 1995 which was unanswered by the Company.

Following its withdrawal of recognition, the Respondent has made several unilateral changes without notice to the Union. It has implemented a retirement plan and solicited employees to join it. It has assigned mandatory overtime to its employees without the 4-hour notice mandated by the collective-bargaining agreement and its final offer. Employees Paul Osborne and Jim Hill testified that they and other employees were told to work overtime and were told they had to do so when they objected notwithstanding that there had been no 4-hour notice given. Brian Morgan denied that employees were required to work overtime without the 4-hour notice. I credit Osborne's and Hill's testimony that they and other employees were compelled to work overtime without being afforded the 4-hour notice mandated by the expired collective-bargaining agreement.

Osborne and Hill also testified that in December 1995 the employees were laid off for 1 or 2 days a week because of lack of work. It is undisputed that these partial layoffs were unilaterally instituted without bargaining by ProGalv.

Employees Jim Hill and Paul Osborne testified that on their return from the strike they observed a seniority list posted by ProGalv which did not give employees credit for the time they had worked at Union Metal although in its final offer at the 1995 negotiations, which Respondent imposed after reaching impasse, Union Metal service time was to be recognized for seniority at the Company. Hill testified that Respondent has not informed employees that this changed seniority list is not in effect. I credit Hill and Osborne whose testimony was not refuted although Respondent contends that no actions were taken premised on this seniority list.

Griggs also testified that in mid-August 1995, he told Harvey Morgan that some employees were discussing trying to bring back the Union and that Morgan said that if they did Niehaus "would lock the doors on this place," and the employees "could kiss the investment fund good-by." Morgan testified he told Griggs that the strike had hurt the plant and if the employees were thinking about bringing the Union back "Werner (Niehaus) wouldn't be happy" and "if that happens, we might as well just lock the gates." I credit Griggs' testimony as set out above which is not substantially refuted by Morgan's testimony.

Griggs' also testified that on about September 18, 1995, Harvey Morgan asked him, "By the way, how did your meeting go with the NLRB?" and he replied, "Fine," whereupon Morgan said, "Turnbull [the Union's International representative] and those guys are just going to hang you out to dry." Morgan denied this and Respondent ProGalv's counsel in his cross-examination of Griggs sought to show that Griggs' testimony was suspect as he had been verbally chastised by Harvey Morgan a day or so prior to this incident over his job performance and his appearance and had given up his leadman position after this occurred. Griggs, who has since left ProGalv, acknowledged this but his testimony was unwavering as to what Morgan said with respect to Griggs' complying with the Board's investigation of the charges then pending against Respondent. Morgan contended that he had no knowledge that Griggs had gone to the Board. I do not credit this denial as Morgan was aware of the Board's investigation as chief operating officer of ProGalv and as the counsel for the General Counsel pointed out in their brief, this was a small plant and Respondent's knowledge of this may be properly inferred from the small size of the plant as well as from the presence of Harvey Morgan's son, Brian Morgan, as plant manager and of two of Harvey Morgan's brothers as employees in the plant. I thus credit the testimony of Griggs over that of Harvey Morgan.

Analysis

I find that Respondent violated Section 8(a)(1) of the Act by President Kelley's solicitation of the petition as this clearly violated the Section 7 rights of the unit employees to freely determine whether they wished union representation. I credit the testimony of Griggs over that of Kelley. I found Griggs to be a truthful witness who was clearly uncomfortable at the hearing as he was required to testify concerning his part in the circulation of the petition and the establishment of the committee and against Kelley who has been a friend to him. Although Griggs was uncomfortable on the stand, his testimony was cogent and responsive and in large part was not refuted by Kelley although Kelley gave a more neutral picture as to his activities than did Griggs. I further find that Griggs' testimony should be credited with respect to Kelley's promise of benefits by promising to Griggs the consideration of the institution of a monthly matching contribution savings plan if the employees rejected the Union (telling Griggs that his idea sounded good but would have to be discussed after all of this was over). This promise by Kelley also violated Section 8(a)(1) of the Act.

I further find that under either Griggs' or Morgan's version of the conversation concerning the locking of the gates if the employees sought to bring the Union back, that Respondent violated Section 8(a)(1) of the Act as it is clear this was a threat of plant closure if the employees sought to exercise their Section 7 rights to be represented by the Union. I further find that Morgan did state as testified to by Griggs that the employees could "kiss the investment fund goodbye" and that Respondent thereby also violated Section 8(a)(1) of the Act as this constituted a threat of the loss of a future benefit.

I find that based on my crediting of Griggs' testimony concerning his interrogation by Harvey Morgan about the NLRB investigation that Respondent violated Section 8(a)(1) of the Act.

With respect to the solicitation of its employees to circulate the petition to get rid of the Union, I find Respondent clearly violated Section 8(a)(1) of the Act by interfering with the employees right to exercise their Section 7 rights to be represented by the Union. Accordingly, the petition is tainted by this unlawful conduct by Respondent and Respondent's withdrawal of recognition and subsequent refusals to bargain with the Union were violative of Section 8(a)(5) and (1) of the Act. *Manna Pro Partners, L.P. v. NLRB*, 986 F.2d 1346, 1353–1354 (10th Cir. 1993); *Choctawhatchee Electric Cooperative, Inc.*, 274 NLRB 595 (1985). Moreover there was no good-faith doubt as to the Union's continuing majority status as the withdrawal of recognition did not occur in a context free of unfair labor practices. *Columbia Portland Cement Co.*, 303 NLRB 880, 882 (1991); *Bay Area Mack*, 293 NLRB 125, 131 (1989); *Celanese Corp. of America*, 95 NLRB 664, 673 (1951).

I further find that Respondent violated Section 8(a)(2) and (1) of the Act by fostering, assisting, and dealing with the In-House Employee Committee as demonstrated by Griggs' testimony which I credit in its entirety. I find the evidence presented by the General Counsel fully supports a finding that the In-House Employee Committee was a labor organization participated in by the unit employees in a representative capacity and was utilized to deal with the Company concerning wages, benefits, and other terms and conditions of employment. Here, the Company clearly fostered, assisted, and dealt with the committee and did so on its own terms such as recommending the number of representatives on the committee, who some of them should be and from what shifts they should be drawn. It is clear also that notwithstanding its consideration of employee requests, it set the agenda for the meetings and covered what it chose to. There was some give and take between Respondent and the committee (i.e., the negotiation with regard to the production bonus). Respondent held the meetings on its premises during paid worktime. Such conduct by Respondent was clearly violative of the Act *Dillon Stores*, 319 NLRB 1245 (1995); *Webcor Packaging*, 319 NLRB 1203 (1995); *Keeler Brass Co.*, 317 NLRB 1110 (1995); and *E. I. du Pont & Co.*, 311 NLRB 893 (1993). See also *Electromation*, 309 NLRB 990 (1992), enfd. 35 F.3d 1148 (7th Cir. 1994); *Classic Industries v. NLRB*, 667 F.2d 205 (1st Cir. 1981).

It is also clear and I find that Respondent violated Section 8(a)(5) and (1) of the Act by instituting unilateral changes in the terms and conditions of employment without giving notice to the Union and affording the Union an opportunity to bargain on the following unilateral changes:

(1) Posting a seniority list which no longer considered time worked at Union Metal in calculating seniority.

(2) Instituting the retirement program and soliciting the employees to sign up for the new retirement program.

(3) Requiring employees to work mandatory overtime without giving them 4 hours' notice as required under the existing terms and conditions of employment in the expired labor agreement and its final offer.

(4) Instituting a partial layoff.

Conclusions of Law

1. Respondent ProGalv is an employer within the meaning of Section 2(6) and (7) of the Act.

2. Respondent Tubular is an employer within the meaning of Section 2(6) and (7) of the Act.

3. Shopmen's Local Union No. 620 of the International Association of Bridge, Structural and Ornamental Iron Workers is a labor organization within the meaning of Section 2(5) of the Act.

4. ProGalv and Tubular are not a single employer and are not the alter ego of each other. Tubular is not otherwise charged independently of ProGalv in the complaint and the complaint against Tubular shall accordingly be dismissed.

5. The appropriate unit of ProGalv employees is:

> All production and maintenance employees of Respondent, including employees engaged in the fabrication, galvanizing, and/or preparation of iron, steel, metal products or in maintenance work in or about Respondent's facility, excluding all office clerical employees, guards and supervisors as defined in the Act.

6. ProGalv violated Section 8(a)(1) of the Act by:

(a) Instigating and soliciting the employee drafting and circulation of a petition seeking the decertification of the Union.

(b) Promising benefits in the form of the institution of a monthly matching contribution savings plan for employees conditioned on employees' rejection of the Union as their collective-bargaining representative.

(c) Threatening employees with loss of benefits if the employees selected the Union as their bargaining representative.

(d) Threatening employees with closure of its plant if the employees selected the Union as their collective-bargaining representative.

(e) Interrogating an employee with regard to his cooperation in the Board's investigation in this case.

7. ProGalv violated Section 8(a)(1) and (5) of the Act by withdrawing its recognition of the Union as the exclusive collective-bargaining representative of employees in the aforesaid appropriate unit and thereafter failing and refusing to recognize and bargain with the Union.

8. ProGalv also violated Section 8(a)(1) and (5) of the Act by failing to adhere to the terms of the collective-bargaining agreement with respect to the formula for calculating employee seniority, the method of assigning overtime work to employees, by the unilateral institution of a retirement program for employees and soliciting its employees to sign up for the progran, and by instituting a partial layoff without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to these mandatory subjects for collective bargaining.

9. ProGalv violated Section 8(a)(1) and (2) of the Act by fostering and rendering unlawful assistance and support to the employee committee, a labor organization.

10. Respondents ProGalv and Tubular did not violate the Act by their refusal to recognize the Union as the exclusive collective-bargaining representative of Tubular's employees.

11. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent ProGalv has engaged in violations of the Act, it will be recommended that it cease and desist therefrom and take certain affirmative actions designed to effectuate the purposes and policies of the Act and post the appropriate notice.

It is recommended that Respondent ProGalv disestablish the employee committee and rescind its withdrawal of recognition and recognize and bargain with the Union and on request by the Union, rescind any one of or all of the unilateral changes implemented by it following its withdrawal of recognition from the Union. The Board does not require that employees suffer the loss of increases in wages and/or improvements in benefits or the addition of new benefits under circumstances such as these and I accordingly do not recommend that any increases in wages and improvements in benefits be rescinded. It is further recommended that Respondent make the employees whole for any loss of wages and benefits suffered because of the changes, with interest. Backpay and benefits shall be computed in accordance with *Ogle Protection Services*, 183 NLRB 682 (1970), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[2]

I further recommend that Respondent restore the status quo ante prior to the date of its withdrawal of recognition from the Union until the Respondent has, on request, bargained with the Union and reached agreement or a valid impasse and that the initial date of union certification be treated as beginning on the date this Order is complied with. See *Mid-South Bottling Co.*, 287 NLRB 1333, 1350 (1988), enfd. 876 F.2d 258 (5th Cir. 1989), enfd. 876 F.2d 458 (5th Cir. 1989); *R & H Masonry Supply*, 238 NLRB 1044, 1050 (1978), modified 627 F.2d 1013 (9th Cir. 1980). See *Glomac Plastics*, 234 NLRB 1309 fn. 4 (1978), enfd. in pertinent part 592 F.2d 94 (2d Cir. 1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, V & S ProGalv, Inc., Muskogee, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Instigating and soliciting the employee drafting and circulation of a petition seeking the decertification of the Union.

(b) Promising benefits of a monthly matching contribution savings plan for employees conditioned on the employees' rejection of the Union as their collective-bargaining representative.

(c) Threatening employees with loss of benefits if the employees select the Union as their collective-bargaining representative.

(d) Threatening employees with closure of its plant if the employees select the Union as their collective-bargaining representative.

(e) Interrogating employees with regard to their cooperation in the Board's investigation of unfair labor practices.

(f) Withdrawing its recognition of the Union as the exclusive collective-bargaining representative of the employees in the aforesaid appropriate unit and thereafter failing and refusing to recognize and bargain with the Union.

(g) Instituting unilateral changes without affording the Union with notice thereof and an opportunity to bargain concerning them by failing to adhere to the terms of the collective-bargaining agreement with respect to the formula for calculating employee seniority, the method of assigning overtime work to employees, the unilateral institution of a retirement program for employees without prior notice to the Union, and by instituting a partial layoff, without affording the Union an opportunity to bargain with Respondent with respect to these mandatory subjects of bargaining.

(h) Fostering and rendering unlawful assistance and support to the employee committee, a labor organization.

(i) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Respondent ProGalv shall take the following affirmative action necessary to effectuate the policies of the Act.

(a) Immediately recognize Shopmen's Local Union No. 620 of the International Association of Bridge, Structural and Ornamental Iron Workers as the exclusive bargaining representative of the employees in the appropriate unit and on

[2] Interest shall be computed at the "short term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

request by the Union rescind all unilateral changes implemented by Respondent ProGalv following its unlawful withdrawal of recognition and refusal to bargain with the Union, and on request by the Union meet and bargain with the Union within 14 days of the request and for such other times as agreed to by the Union. Make the unit employees whole for any loss of wages and benefits, with interest, they may have incurred as a result of the withdrawal of recognition from the Union and refusal to bargain by Respondent ProGalv and by reason of the unlawful unilateral changes instituted by Respondent ProGalv in their terms and conditions of employment.

(b) Treat the initial year of union certification as beginning on the date this Order is complied with.

(c) Disestablish the In-House Employee Committee.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 13, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint against Respondent Tubular is dismissed.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."